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Jerald Allen Gomez v Shencourt Sdn Bhd (Majlis Peguam, intervenor)

HIGH COURT (KUALA LUMPUR) — APPEAL NO R–17B–151 OF 2002
ABDULL HAMID EMBONG, RAUS SHARIF AND ZAINUN ALI JJ
B 21 NOVEMBER 2005

Administrative Law — Rules of natural justice — Breach of — Disciplinary Committee — Procedural fairness — Refusal to supply notes of proceedings of the Investigating Tribunal which the Disciplinary Committee referred to at its hearing — Whether it
C *matters that appellant was present and had taken his own notes at the proceedings — Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 r 16*

D On 2 December 1996, the respondent lodged a complaint against the appellant, their solicitor. The complaint was essentially for acting in conflict of interest, negligence and overcharging by the appellant. The Investigating Tribunal constituted to investigate this complaint recommended to the Disciplinary Board that a formal investigation be conducted only in respect of the complaint against overcharging.
E On 22 August 2002, the Disciplinary Committee found the appellant guilty of the overcharging charge and recommended that the appellant be fined RM3,000. On 11 October 2002, the Disciplinary Board imposed the said penalty which the appellant duly paid. The appellant on 1 November 2002, lodged an appeal to this court pursuant to s 103E of the Legal Profession Act 1976 ('LPA'). Learned counsel for the appellant raised two points. Firstly it was submitted that the Disciplinary
F Board was in breach of the rule of procedural fairness when it refused to accede to the appellant's request to be supplied with the notes of proceedings of the Investigating Tribunal which the Disciplinary Committee had referred to at its hearing. It was not in dispute that at the Disciplinary Committee stage these notes were referred to and questions from it were asked of the appellant. In reply,
G Mr Robert Lazar for the Bar Council stated that the appellant was fully aware of the exact charges against him and that no prejudice had occurred. Counsel referred to r 16 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 which states that, 'The Investigating Tribunal shall make a record of the proceedings before it' and submitted that there was no requirement for those notes to be furnish to the appellant. In fact, the appellant was
H present with his solicitor throughout the entire proceedings at the Investigating Tribunal and Disciplinary Committee and had taken down his own notes. As such, there was no breach of natural justice.

I **Held**, allowing the appeal:

The protest by the appellant on the Disciplinary Committee's act on referring to the notes of proceedings of the Investigating Tribunal during its Disciplinary Committee deliberation, alone in this court's view tantamount to a failure to provide full disclosure on materials used to condemn the appellant. The refusal by the

Disciplinary Board to accede to the appellant's request for the notes of proceedings amounted to prejudicing his position before the Disciplinary Committee, and as such, its procedure was lacking in transparency and fairness. In other words, a breach of natural justice had occurred. It matters not that the appellant was present or even had taken his own notes at the proceedings before the Investigating Tribunal. The crux of the issue here was that the Disciplinary Committee had come to a decision based on materials not available to the appellant, and for which he had asked for. The court agreed with learned counsel for the appellant that this was an instance where the arbiter had gone behind the back of the appellant in looking at the evidence (see paras 9–10); *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] MLJ 169 followed.

[Bahasa Malaysia summary

Pada 2 Disember 1996, responden telah membuat aduan terhadap perayu, peguam mereka. Aduan tersebut adalah berkenaan tindakan yang berkonflik kepentingan, kecuaian dan terlebih caj oleh perayu. Tribunal Siasatan telah dibentuk untuk menyiasat aduan ini yang telah disarankan kepada Lembaga Tatatertib bahawa satu siasatan rasmi dilakukan hanya berkaitan aduan berhubung terlebih caj itu. Pada 22 Ogos 2002, Jawatankuasa Tatatertib mendapati perayu bersalah kerana terlebih caj dan menyarankan agar perayu didenda RM3,000. Pada 11 Oktober 2002, Lembaga Tatatertib telah mengenakan penalti tersebut yang mana perayu telah membuat bayaran. Perayu pada 1 November 2002, telah merayu ke mahkamah ini menurut s 103E Akta Profesyen Undang-Undang 1976 ('APU'). Peguam bijaksana bagi pihak perayu telah menimbulkan dua perkara. Pertama, ia dihujahkan bahawa Lembaga Tatatertib telah melanggar rukun prosedur keadilan apabila ia enggan menyetujui permintaan perayu untuk disediakan dengan nota prosiding Tribunal Siasatan yang mana Jawatankuasa Tatatertib telah rujuk semasa perbicaraannya. Ia tidak mempertikaikan bahawa di peringkat Jawatankuasa Tatatertib nota-nota tersebut telah dirujuk dan soalan telah ditanya berhubung perayu. Dalam jawapannya, En Robert Lazar bagi pihak Majlis Peguam menyatakan bahawa perayu sedar tentang pertuduhan yang dikenakan terhadapnya dan babhawa tiada prejudis berlaku. Peguam telah merujuk kepada k 16 Kaedah-Kaedah Amalan Guaman (Prosiding Tatatertib) (Tribunal Siasatan dan Jawatankuasa Tatatertib) 1994 yang menyatakan bahawa, 'The Investigating Tribunal shall make a record of the proceedings before it' dan berhujah bahawa tiada keperluan untuk nota-nota tersebut dikemukakan kepada perayu. Bahkan, perayu hadir dengan peguamnya sepanjang prosiding tersebut semasa Tribunal Siasatan dan Jawatankuasa Tatatertib dan telah mengambil notanya sendiri. Oleh itu, tidak berlaku perlanggaran keadilan asasi.]

Diputuskan, membenarkan rayuan tersebut:

Bantahan oleh perayu terhadap tindakan Jawatankuasa Tatatertib merujuk kepada nota-nota prosiding Tribunal Siasatan semasa Jawatankuasa Tatatertib bersidang, denagn sendirinya pada pendapat mahkamah sama seperti satu kegagalan untuk mengemukakan pendedahan sepenuhnya berhubung bahan-bahan yang digunakan untuk menunjukkan perayu bersalah. Keengganan Lembaga Tatatertib untuk menyetujui permintaan perayu untuk nota-nota prosiding membentuk satu prejudis

terhadap kedudukannya di hadapan Jawatankuasa Tatatertib, dan oleh itu, prosedurnya tidak telus dan adil. Dalam kata lain, satu perlanggaran keadilan asasi telah berlaku. Ia tidak penting jika perayu hadir ataupun mengambil nota sendiri semasa prosiding dijalankan di hadapan Tribunal Siasatan. Persoalan utama di sini adalah bahawa Jawatankuasa Tatatertib telah tiba kepada satu keputusan berdasarkan bahan yang tidak ada pada perayu, dan yang mana telah ditanyakan olehnya. Mahkamah bersetuju dengan peguam bijaksana bagi pihak perayu bahawa dalam keadaan sedemikian pemutus tidak berlaku adil terhadap perayu semasa meneliti keterangan (lihat perenggan 9–10); *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] MLJ 169 diikut.

Notes

For cases on breach of rules of natural justice, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 712–724.

Cases referred to

Au Kong Weng v The Bar Committee, Pahang [1980] 2 MLJ 89 (refd)
B Surinder Singh Kanda v Government of the Federation of Malaya [1962] MLJ 169 (folld)
Bhadari v Advocates Committee [1956] 3 All ER 742 (refd)
Keith Sellar v Lee Kwang [1980] 2 MLJ 191 (refd)
Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Or [1995] 1 MLJ 308 (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 493 (refd)
Russel v Duke of Norfolk [1949] 1 All ER 109 (refd)
Wiseman v Borneman [1971] AC 297 (refd)

Legislation referred to

Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 rr 16, 22, 31
Legal Profession Act 1976 ss 93(1), 99(1), 100(1), 101(1), 102(1), (2), 103A(1)(a), 103C, 103C(1), 103D, 103D(1)(a), (b), 103D(3), 103E, 103P(1), Part VII

Raja Aziz Addruse (Ramdas Tikamdas with him) (Jerald Gomez & Associates) for the appellant.
Fauziah Mustaffa (Rajindar Singh Veriah & Co) for the respondent.
Robert Lazar (Sheila Ramalingam with him) (Shearn Delamore & Co) for the intervenor.

Abdull Hamid Embong J:

BACKGROUND

[1] On 2 December 1996, the respondent lodged a complaint against the appellant, their solicitor. The respondent, a property developer, had earlier retained the firm of Jerald Gomez & Associates as their solicitor to negotiate for them in the purchase of a bungalow in Bangsar. The complaint was essentially for acting in conflict of interest, negligence and overcharging by the appellant.

[2] The investigating tribunal constituted to investigate this complaint recommended to the disciplinary board that a formal investigation be conducted only in respect of the complaint against overcharging. On 22 August 2002, the disciplinary committee found the appellant guilty of the overcharging charge and recommended that the appellant be fined RM3,000. On 11 October 2002, the Disciplinary Board imposed the said penalty which the appellant duly paid. The appellant on 1 November 2002, lodged an appeal to this court pursuant to s 103E of the Legal Profession Act 1976 ('LPA').

[3] At the outset of this hearing before us on 8 September 2005, Cik Fauziah Mustaffa for the respondent intimated that she would not make any submission. The Bar Council ('the intervenor') was given leave to intervene in these proceedings on 18 February 2002.

[4] Raja Aziz Addruse, of counsel for the appellant, alluded to the natural justice point in his written submission and requested that issue be heard before the merits of the case, for if the appellant succeeded on that substantive ground, the appeal could be allowed forthwith. The court acceded to counsel's request.

THE NATURAL JUSTICE ISSUE

[5] Learned counsel for the appellant raised two points. Firstly, it was submitted that the disciplinary board was in breach of the rule of procedural fairness when it refused to accede to the appellant's request to be supplied with the notes of proceedings of the investigating tribunal which the disciplinary committee had referred to at its hearing. It was not in dispute that at the disciplinary committee stage, these notes were referred to and questions from it were asked of the appellant. In reply, Mr Robert Lazar for the Bar Counsel stated that the appellant was fully aware of the exact charges against him and that no prejudice had occurred. Counsel referred to r 16 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 which states that, 'The investigating tribunal shall make a record of the proceedings before it' and submitted that there was no requirement for those notes to be furnished to the appellant. In fact, the appellant was present with his solicitor throughout the entire proceedings at the investigating tribunal and disciplinary committee and had taken down his own notes. As such, there was no breach of natural justice.

[6] This court agreed with learned counsel for the appellant on this point. The case of *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 493 was cited, in particular the following passage in the judgment of Edgar Joseph Jr. J:

> It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review; for example, a defendant is generally entitled to notice of evidence that might assist his case. It is, therefore, a breach of natural justice for the prosecution to conceal such evidence: *R v Leyland Justices, ex p Hawthorn* [1979] QB 283.

[7] A similar principle, founded on the need for fair play, may be extracted from the advice of the Privy Council in *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] MLJ 169 where it was held that:

> (2) The right to be heard carries with it the right of the accused to know the case made against him, the evidence given and the statements made affecting him; and he must be given a fair opportunity to correct or contradict them. The judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. The court will not go into the likelihood of prejudices. The risk of it is enough. Applying these principles, applicant was not given a reasonable opportunity of being heard.

[8] This court accepts and adopts the principles as declared by those cases. On 22 November 2002, the appellant had written to the disciplinary board, the relevant paragraph is now reproduced:

> I also refer to your letter dated 14 November 2002. I have perused the certified copy of the documents forwarded and have noted that several documents have not been included, and some placed the wrong part. I wish to highlight the following:
>
> (1) The letter of complaint was followed up with a further letter from the complainant on the request of the secretariat where the complainant enclosed other documents. These documents are not in your bundle but were referred to at the IT stage.
>
> (2) The copy of the explanation does not have all the pages — p 5 is not included.
>
> (3) The enclosures to the explanation were only up to JGA-18, but in your bundle there are additional enclosures from JGA-19 up to JGA-51, which were not submitted with the written explanation.
>
> (4) I have perused the section on the IT report, which did not include the notes of proceedings:
>
> (i) I have acted for the Bar Council in appeals from decisions of the disciplinary board. In those records, you have furnished the notes of proceedings at the IT and DC stages.
>
> (ii) I have also contacted the previous director, the Complaints Secretariat who confirmed that:
>
> (a) the report of the IT also contains the notes of proceedings, and
>
> (b) the secretariat has always furnished the notes of proceedings of the IT and the DC as a matter of policy and fairness.
>
> (iii) The DC on several occasions referred to the notes of proceedings of the IT and asked my counsel and I, questions on the same. When we asked for a copy of the notes of proceedings, we were informed that we were not entitled to the same. This can be verified by the Chairman of the DC.
>
> (iv) I refer to my letter dated 18 June 2002 requesting you for the notes of proceedings of the IT before the DC hearing (a copy of my letter to you and your response is annexed for your easy reference).
>
> (v) It is a requirement of the rules pursuant to r 16 that the IT make a record of the proceedings.
>
> (vi) It was probably an inadvertent omission on your part. Kindly forward the notes of proceedings as soon as possible.

[9] Para 4(iii) above is most pertinent since it adverted to a protest by the appellant on the disciplinary committee's act on referring to the notes of proceedings of the investigating tribunal during its (DC) deliberation. This alone in this court's view tantamount to a failure to provide full disclosure on materials used to condemn the appellant. In our considered view, this refusal by the disciplinary coard to accede to the appellant's request amounts to prejudicing his position before the disciplinary committee, and as such, its procedure was lacking in transparency and fairness. In other words, a breach of.natural justice had occurred. As stated by the Court of Appeal in *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Or* [1995] 1 MLJ 308:

> A fair procedure includes the duty of an arbiter not to take into account matters that have not been first put to the accused with an opportunity for him to rebut them.

[10] It matters not, as was argued by counsel for the intervenor, that the appellant was present or even had taken his own notes at the proceedings before the investigating tribunal. The crux of the issue here was that the disciplinary committee had come to a decision based on materials not available to the appellant, and for which he had asked for. We agree with learned counsel for the appellant that this was an instance where the arbiter had gone behind the back of the appellant in looking at the evidence (see *B Surinder Singh Kanda*).

[11] Counsel from both side had referred to *Wiseman v Borneman* [1971] AC 297. This court, in coming to its decision had applied some of the principles and observations of their Lordships in that case and in particular to the following extracts:

(1) What Lord Morris of Borth-y-Gest said, at p 309:

(i) On natural justice —

> The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only fair play in action.

(ii) On referring to documents not made available to the affected party —

> ... I feel bound to express my prima facie dislike of a situation in which the tribunal has before it a document (which might contain both facts and arguments) which is calculated to influence the tribunal but which has not been seen by a party who will be affected by the tribunal's determination.

(2) What Lord Guest said on the application of natural justice principles —

> It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the statute is silent upon the question, the courts will, imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be made upon the basis that Parliament is not to be presumed to take away parties rights without giving them an opportunity of being heard in their present. In other words, Parliament is not to be presumed to act unfairly. The dictum of Byles J in *Cooper v Wandsworth Board of Works*14 CBNS 180, 194 is clear to this effect and has been followed in many subsequent cases.

Where, however, the matter which the tribunal has to decide is a preliminary point which does not finally decide the rights of parties, then the question arises whether, and, if so, to what extent, the principles of natural justice should be followed by the tribunal.

[12] His Lordship then went on to quote the opinion of Tucker LJ in *Russel v Duke of Norfolk* [1949] 1 All ER 109, at p 118, who said

There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

[13] In applying these fundamental principles to the facts of this case, this court was aware and took note of the observation of the Court of Appeal in *Raja Abdul Malek Muzaffar Shah* (by way of per curiam) in the following words:

The measure of fairness afforded to a particular plaintiff is a question of fact and of degree that is to be judged according to our own standards and values and not according to the values of a foreign judge, however, eminent.

[14] Before this court, the appellant is complaining about the disciplinary committee making reference to the notes of proceedings which was not made available to him, in making a decision and its recommendation to the disciplinary board. In our view, this decision was not on a preliminary point or one to decide on a prima facie case against the appellant. The finding of the disciplinary committee together with its recommendation of imposing a RM3,000 fine was fully affirmed by the disciplinary board on 11 October 2002 without any further deliberation by the latter.

[15] The disciplinary proceedings under Part VII of the LPA provides for an elaborate and exacting scheme as accurately tabulated by learned counsel for the appellant, now reproduced:

(1) For the establishment of a disciplinary Board to which complaints are to be referred or addressed (s 93(1) and s 99(1);

(2) If the Disciplinary Board considers any such complaint to -have merit, it will appoint an Investigating Tribunal to inquire into the complaint (s 100(1));

(3) The Investigating Tribunal is to investigate into the complaint and report its findings to the Disciplinary Board (s 101(1) and s 102(1) and (2));

(4) If the Disciplinary Board, upon considering the report of the Investigating Tribunal, considers that there be a formal investigation, it appoints a Disciplinary Committee to consider any matter referred to in the report (s 103A(1)(a) and s103B(1));

(5) After hearing and investigation any such matter, the Disciplinary Committee will record its findings in relation to the facts of the case and according to those acts shall determine and make any one of several recommendations (s.103C(1)) and report to the Disciplinary Board (s 103P(1)).

(6) Thereafter the Disciplinary Board may:

(a) affirm the recommendations of the Disciplinary Committee and, either accept its recommendation as to the punishment to be imposed or, in exceptional cases, increase the punishment (s 103D(1)(9) and (b); or

(b) if it does not agree with the recommendations, make such other order as it deems fit (s 103D(3)).

[16] The disciplinary committee as evidenced from the records sat over two days and had enquired substantively into the complaints. Witnesses were heard, examined and cross examined. This has to be. Its duty is quasi judicial in nature and the disciplinary committee could recommend disciplinary action against an advocate and solicitor which at its highest could mean the end of one's career. Its findings therefore must be undertaken after careful deliberations and understanding of the factual background to the complaints. In this court's view, once the disciplinary committee made its decision and recommendations under s 103C of the LPA, it would invariably be accepted without further deliberation by the final authority, ie the disciplinary board, whose duty is to consider the report of the disciplinary committee and to affirm or disagree with its recommendations (see s 103D of the LPA). There is no further hearing on the complaint at this stage, which makes the proceedings at the disciplinary committee stage even more critical and significant. Thus in this case, the decision of the disciplinary committee was completely endorsed. It cannot be overly emphasised therefore, that this stage of the proceedings is of crucial importance to the appellant. Unlike the enquiry at the investigating tribunal stage where it can be said that its role was to determine a prima facie case against the appellant and recommend a formal investigation, the proceedings at the disciplinary committee stage is obviously more determinate and telling in scope. And so this court cannot accept the submission of learned counsel for the intervenor that seems to suggest that the hard and fast rule of natural justice is not applicable here since the investigation by the disciplinary committee was but to determine a prima facie against the appellant.

[17] On this ground alone, the appeal was allowed by this court. Learned counsel for the appellant did however raise another point, which we now consider. It was argued that the procedure adopted by the disciplinary committee was irregular and unfair. Learned counsel submitted that It was first necessary for the complainant to prove the substance of its allegations before the appellant be called to enter his defence. The disciplinary committee at its hearing instead reversed the process and in the absence of the respondent/complainant's evidence, the appellant was asked to rebut the allegations. It was submitted by learned counsel for the appellant that when the respondent's request for an adjournment was rejected, the disciplinary committee instead of hearing the appellant, should have dismissed the complaint since the allegations were not proven. The respondent, it was argued, had a burden to prove its case beyond a reasonable doubt.

[18] Part VII of the LPA, and the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ('the 1994 Rules'), do not provide for a detailed arrangement on the procedure for its hearing and investigation in a disciplinary matter. Rule 31 of the 1994 Rules however provides the Chairman of the Disciplinary Board with powers to give directions to the disciplinary committee on the investigating tribunal on matters of procedure as he thinks fit. No such directions were given in the instant case. Rule 22 of the 1994 Rules provides for the course of action that may be taken by the disciplinary committee in a situation where a party is absent at its hearing. It states:

> 22. Absence of parties before Disciplinary Committee.
>
> Where on the date fixed for the hearing and investigation of the complaint, the complainant or the advocate and solicitor concerned or both fail or fails to attend before the Disciplinary Committee, the Disciplinary Committee may, upon being satisfied that the notice of the hearing has been posted to the person or persons concerned, the hearing has been posted to the person or persons concerned, proceed to hear and investigate the complaint in the absence of such person or persons without further notice to such person or persons and make its determinations and recommendations to the Disciplinary Board.

[19] It is clear therefore that the disciplinary committee may proceed to hear, investigate and determine the complaint even in the absence of either party. So there is nothing inherently irregular in reaching a decision in the absence of one of the parties, since the governing statute has provided for such a situation. The notes show that on 22 August 2002 when the representative of the respondent, one Dato' Lee Kam Yoong failed in his attempt to secure a postponement, the disciplinary committee went on to hear the appellant first. When the hearing was adjourned to the following day, Dato' Lee Kam Yoong was present and propounded the complaint against the appellant and was subsequently cross- examined by the latter. In our view, there is nothing irregular or unfair in the procedure adopted by the disciplinary committee. The proceedings although quasi-judicial in nature need not emulate the strict adversarial procedure practised in a criminal court. This is not a criminal trial but a disciplinary proceedings. So long as it is seen that 'fair play is in action' to borrow Lord Morris' words, and that the procedures applied are just and fair, then, in this court's view, it cannot be said that the disciplinary committee had committed a breach of procedural fairness.

[20] Where a domestic body such as the disciplinary committee exercises its power for which the procedures in its proceedings was; not provided by law, this Court will assume that in following its ad hoc procedure, it has exercised that power in a regular manner.

[21] The only requirement is that there was no violation of the rules of natural justice. To say that, in the absence of such procedures, the disciplinary committee should adhere strictly to the procedures in the proceedings of a criminal court, would be implying some requirements not intended by statute. It would also entail unnecessary delay in a procedure under Part VII of the LPA which is essentially designed to be fairly summary (see *Wiseman v Borneman*, Lord Guest's judgment). In *Halsbury Laws of England* (4th Ed, 2001 Reissue), para 108, the law is expressed in the following manner:

> 108. Conduct of the hearing. A tribunal enjoys a discretion to regulate its own method of proceeding. If there is some statutory or other express procedure which applies to the decision or inquiry, that procedure must obviously be complied with. However, in certain circumstances the courts will be willing to supplement an express procedure with implied obligations required by fairness.

[22] Thus, in this court's view, the procedure adopted by the Disciplinary Committee in this case was proper and regular and in conformity with the LPA and its rules of procedure.

[23] As a corollary to the wrong procedure argument above, learned counsel for the appellant also submitted that the disciplinary committee had failed to apply a high standard of proof in finding the appellant the complaint. The Federal Court's decision in *Keith Sellar v Lee Kwang* [1980] 2 MLJ 191, was cited as authority for the proposition that in every allegation of professional misconduct involving an element of deceit or moral turpitude, the standard of proof required is proof beyond a reasonable doubt. The Federal Court followed its previous decision in *Au Kong Weng v The Bar Committee, Pahang* [1980] 2 MLJ 89, which relied on that principle as stated in *Bhadari v Advocates Committee* [1956] 3 All ER 742. In this instant case, the appellant was found to be guilty of essentially of presenting a misleading bill and of overcharging without any justification. The question which this court needs to; address is whether the appellant was found to be guilty of misconduct involving deceit or moral turpitude? The disciplinary board certainly did not make any findings of either deceit, fraud or dishonesty in its report. As for the second element, the word 'turpitude' is defined in the *Oxford Dictionary* as being 'wicked or depraved' which assumes a dishonest intent. Going by the notes of proceedings, we find no such evidence or determination by either the disciplinary committee or the disciplinary board. In *Bhandari*'s case, the Privy Counsel accepted the finding of the Court of Appeal quoting the following passage from the latter's judgment:

> With regard to the onus of proof, the Court of Appeal said:
>
> > We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities.

[24] No mention was made in both those English decisions of the requirement for a standard of proof of beyond a reasonable doubt. In our view that standard as held in *Keith Sellar* (a case involving the non return of a client's money paid into his solicitor's firm) should be confined to a misconduct involving only any of those two aforementioned elements. As for this case, it is this court's finding that the transgression by the appellant could not be classified under any of those two elements. As such, a high standard of proof is sufficient, not one of beyond a reasonable doubt as understood in the criminal law sense. We must however adhere to the finding of the Federal Court in *Keith Sellar* that the finding of facts as opposed to a finding of guilt, (by the disciplinary committee which heard and investigated the complaint) should be on a standard of beyond a reasonable doubt. This court will not

however go behind the finding of facts by the disciplinary committee since the merits of this case have not been ventilated and argued before us.

[25] In any event, counsel for the appellant has not shown to us that the disciplinary committee had used a wrong standard of proof. Now, even if the disciplinary cmmittee had failed to mention this aspect, this does not necessarily mean that it had gone wrong in finding the Appellant guilty based on a proper standard proof to justify our interference. As was said by Raja Azlan Shah CJ in *Au Kong Weng v The Bar Committee, Pahang* [1980] 2 MLJ 89 (at p 91):

> The absence in the Committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it.

[26] For these reasons, this appeal was allowed. As the appellant did not ask for costs, we make no order as to costs.

Appeal allowed.

Reported by Sally Kee